No. 15696

United States
Court of Appeals
for the Ninth Circuit

MARTY W. LANDAU, doing business as Riverside Rancho, Appellant,

vs.

ROBERT A. RIDDELL, individually and as District Director of Internal Revenue for the Sixth District of California, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California,
Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—11-11-57

No. 15696

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CLINTON F. SECCOMBE,
6399 Wilshire Boulevard,
Los Angeles 48, California.

For Appellee:

CHARLES K. RICE,
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LEE A. JACKSON,
Attorney,
Department of Justice,
Washington 25, D. C.,

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant United States Attorney,
808 Federal Building,
Los Angeles 12, California. [1]*

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 20341-BH

MARTY W. LANDAU, doing business as RIVERSIDE RANCHO, Plaintiff,

vs.

ROBERT A. RIDDELL, individually and as District Director of Internal Revenue for the Sixth District of the State of California, Defendant.

COMPLAINT

(For Recovery of Excise Taxes—Admissions, Cabaret—Illegally Collected)

Plaintiff complains of the defendant and for cause of action alleges as follows:

I.

That at all times herein mentioned plaintiff Marty W. Landau was and now is an individual doing business under the fictitious name and style of Riverside Rancho at 3213 Riverside Drive, City of Los Angeles, County of Los Angeles, State of California; that plaintiff is a citizen of the United States of America, residing within the County of Los Angeles, State of California.

II.

That at all times herein mentioned the defendant Robert A. Riddell was and now is the duly ap-

pointed acting [2] Collector of Internal Revenue, now known and designated as the Assistant Director of Internal Revenue, for the Sixth District of the State of California, acting for and on behalf of the United States of America.

III.

That Robert A. Riddell is made the defendant herein in accordance with and by virtue of Sections 1346 and 1491 of the Judicial Code of the United States of America.

IV.

That between on or about the 1st day of December, 1949, and on or about the 1st day of November, 1951, plaintiff duly filed with the defendant herein his excise taxes—admission (also known as cabaret taxes) tax reports and returns, in accordance with the revenue acts of the United States of America then in effect, to-wit, and more particularly, Section 1700(a) and Section 1700(c) of the Internal Revenue Code of the United States of America; that at the time of such filings, and for said periods, plaintiff paid to the defendant, as Collector of Internal Revenue, the total sum of Nineteen Thousand Five Hundred Ninety and 93/100 ($19,590.93) Dollars, said amounts being paid by plaintiff under protest for the reason that such cabaret taxes were not legally due from plaintiff because plaintiff was not during said times operating a cabaret. That the periods for which said taxes were paid and the amounts thereof, will

more clearly appear from an itemized list thereof which is a part of Exhibit "A", attached hereto, and by this reference made a part hereof.

V.

That on the 25th day of January, 1954, plaintiff filed his written claim for a refund of the amount of said taxes, or such greater amount as might be legally refundable, with defendant herein, a full true and correct copy of which claim is attached [3] hereto, marked Exhibit "A", and by this reference made a part hereof; that said claim for refund was based on the ground that plaintiff was not liable for the payment of cabaret taxes, and said taxes were erroneously paid over to the defendant.

VI.

That thereafter on or about the 15th day of March, 1956, the defendant notified plaintiff that said claim for refund was rejected, and neither said amount so collected, nor any part thereof, has been repaid to plaintiff.

VII.

That in April, 1947, plaintiff commenced the operation of a ballroom for dancing, known by the fictitious name of Riverside Rancho, at 3213 Riverside Drive, City of Los Angeles, County of Los Angeles, State of California; that from said date to the present date plaintiff operated, and is still operating, said Riverside Rancho as a ballroom, charging an admission price ranging from $1.00 to $1.20 per person, including federal tax, except for

ladies on Wednesday and Sunday nights when they were admitted for 20c; that persons paying such admission price were not allowed to pass out of the ballroom and return to the ballroom without paying a second and new admission fee; that said business is licensed as a ballroom by the City of Los Angeles, State of California.

VIII.

That at all times herein mentioned plaintiff also operated a "milk bar" in the patio of said Riverside Rancho ballroom business; that said "milk bar" was and is located in a building separate and apart from the ballroom and at a distance of approximately 35 feet from the ballroom building; that at all times herein mentioned plaintiff also operated a ""bar" serving liquors and beer, which "bar" was and is located off and away from the ballroom, completely separated therefrom by a solid [4] wooden partition; that at all times herein mentioned plaintiff also operated a "dining room" on the second story of a building separate and apart from the ballroom and approximately 75 to 100 feet therefrom.

IX.

That an orchestra playing dance music was employed by plaintiff to play music for the dancing of the ballroom customers; that at no time was it possible for the customers in the "bar", "milk bar" and/or "dining room", hereinabove referred to, to hear or dance to the orchestra playing in the ballroom; that at no time was it possible for any cus-

tomer in the "bar", "milk bar" and/or "dining room" to see and/or view the orchestra or the dancers and customers in the ballroom.

X.

That no entertainment of any kind was furnished to the ballroom customers in addition to the dance music hereinabove referred to; that no refreshments of any kind were served in the ballroom; that no food or beverage was allowed to be carried into the ballroom; that no tables or chairs were provided for the customers in the ballroom with the exception of benches placed along the wall which were provided so that the customers in the ballroom could rest between dances.

XI.

That since December, 1947, plaintiff's ballroom and nearby "bar", "milk bar" and "dining room" were diligently constructed, operated and remodeled by plaintiff in strict compliance and conformity with the advice of defendant's qualified agents, employees and officials of the Internal Revenue Bureau of the United States of America, said advice being given to plaintiff for the express purpose of classifying plaintiff's business as a ballroom and therefore not subject to a "cabaret tax" as provided in Section 1700(e) of the Internal Revenue Code. [5]

XII.

That in complete disregard of plaintiff's rights as a ballroom operator, as aforesaid, the defendant wrongfully and unlawfully assessed a tax of

$19,590.93 upon plaintiff's said ballroom operation as a cabaret; that said tax was paid by plaintiff under protest, as aforesaid.

XIII.

That by reason of the premises the defendant became indebted and is indebted to plaintiff in the sum of $19,590.93, together with interest thereon; that no part of said sum has been repaid to plaintiff.

Wherefore, plaintiff prays judgment against the defendant for the sum of $19,590.93, together with interest thereon at the rate of Seven per cent (7%) per annum from the dates of payment; and for plaintiff's costs of suit incurred herein; and for such other and further relief as to the Court may seem just and proper in the premises.

ENGER & YARDUM,
/s/ By LE VONE A. YARDUM,
Attorneys for Plaintiff. [6]

Duly Verified. [9]

[Exhibit A—Claim for Refund is set out at pages 67-69 as part of Plaintiff's Exhibit 4.]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

ANSWER

Now comes the above-named defendant, by his attorney, Laughlin E. Waters, United States Attorney in and for the Southern District of California, and for his answer to the complaint filed herein alleges and says:

1. Admits the allegations contained in paragraph numbered I thereof.

2. Admits the allegations contained in paragraph numbered II thereof.

3. Admits the allegations contained in paragraph numbered III thereof.

4. Admits the allegations contained in paragraph numbered IV thereof, except that it is denied that the cabaret taxes referred to in said paragraph were not legally due from plaintiff; and except that it is denied that plaintiff was not during the periods involved operating a cabaret; and except that it is denied that the cabaret taxes referred to in said paragraph were paid under protest.

5. Admits the allegations contained in paragraph numbered V thereof, [10] except that each and every allegation set forth in the claim for refund filed by plaintiff, copy of which is attached to the complaint as Exhibit A, is denied.

6. Admits the allegations contained in paragraph numbered VI thereof.

7. Denies the allegations contained in paragraph VII thereof, except admits that in April, 1947, plaintiff commenced the operation of his business, known by the fictitious name of Riverside Rancho, at 3213 Riverside Drive, City of Los Angeles, County of Los Angeles, State of California, and that from said date to the present date plaintiff operated and is still operating said Riverside Rancho, charging an admission price ranging from $1.00 to $1.20 per person, including federal tax, except for ladies on Wednesday and Sunday nights when they were admitted for 20c.

8. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of all the allegations contained in paragraph numbered VIII thereof.

9. Denies the allegations contained in paragraph numbered IX thereof, except that it is admitted that an orchestra playing dance music was employed by plaintiff to play music for the dancing of plaintiff's customers as alleged in said paragraph.

10. Denies the allegations contained in paragraph numbered X thereof.

11. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of all the allegations contained in paragraph numbered XI thereof.

12. Admits the allegations contained in paragraph numbered XII thereof, except that it is

denied that the defendant wrongfully and unlawfully assessed a cabaret tax of $19,590.93 upon plaintiff's business operation, and except that it is denied that said tax was paid by plaintiff under protest.

13. Denies the allegations contained in paragraph numbered XIII thereof, except that it is admitted that no part of the cabaret tax sought to be recovered herein has been repaid to plaintiff.

Wherefore, the defendant prays that the complaint filed herein be dismissed with costs to be assessed against the plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant U. S. Attorney,

/s/ JOHN G. MESSER,
Attorneys for Defendant,
Robert A. Riddell. [12]

Affidavit of Service by Mail Attached. [13]

[Endorsed]: Filed October 26, 1956.

United States District Court, Southern District of California, Central Division

No. 20341-BH Civil

MARTY W. LANDAU, etc., Plaintiff,

vs.

ROBERT A. RIDDELL, etc., Defendant.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

MARTY W. LANDAU, etc., ROBERT A. RIDDELL, etc.,
Defendants in Intervention.

COMPLAINT IN INTERVENTION FOR FEDERAL EXCISE TAXES

Comes Now the United States of America and by leave of the Court, files this, its Complaint in Intervention herein and alleges:

1. That the United States of America is a sovereign and a corporate body politic.

2. This action in intervention is commenced at the direction of the Attorney General of the United States and is authorized and sanctioned by the United States Commissioner of Internal Revenue.

3. Federal excise taxes for the period commencing October 1, 1950 and ending September 30, 1953

in the amount of [14] $4,564.16 were assessed against the plaintiff and defendant in intervention Marty W. Landau, doing business as "Riverside Rancho," by the Commissioner of Internal Revenue of the United States. The said taxes, together with interest thereon in the amount of $766.33, being assessed on the Commissioner's assessment list which was signed by the Commissioner and was received by the District Director of Internal Revenue on April 8, 1954.

4. The first notice and demand for payment of the aforesaid taxes and interest thereon was issued by the District Director of Internal Revenue on April 13, 1954.

5. On the date the assessment list was received by the District Director of Internal Revenue, the United States of America, intervenor herein, by virtue of the provisions of Section 3670 of the Internal Revenue Code of 1939, acquired liens against all property and rights to property of the defendant in intervention, Marty W. Landau, for the entire amount of the aforesaid taxes plus penalties and interest thereon according to law. A notice of said liens was duly filed with the County Recorder for Los Angeles County, State of California, on January 24, 1955, as No. 1940.

6. In January, February, March, May, June and August of 1955, the defendant in intervention, Marty W. Landau, made payments to the Commissioner of Internal Revenue against the aforesaid liability for excise taxes in the total amount of

$880.49. No part of the balance of the aforesaid assessment in the amount of $4,450.00, plus interest as provided by law, has been paid, and the entire amount thereof remains unpaid and due and owing from the defendant in intervention, Marty W. Landau, to the United States of America, which amount he has failed and refuses to pay to the United States of America notwithstanding demands for payment made upon him by or in behalf of the United States of America.

Wherefore, the United States of America, intervenor herein, prays: [15]

(a) That the Court enter judgment in its favor against the defendant in intervention, Marty W. Landau, in the sum of $4,450.00, plus penalties and interest according to law.

(b) For such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant U. S. Attorney,

/s/ JOHN G. MESSER,
Attorneys for United States of America, Plaintiff in Intervention.

It Is Hereby Stipulated that the within Complaint in Intervention may be filed.

ENGER & YARDUM,
/s/ By LE VONE A. YARDUM,

Attorneys for Plaintiff and Defendant in Intervention Marty W. Landau.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

JOHN G. MESSER,
Assistant U. S. Attorney,

/s/ JOHN G. MESSER,
Attorneys for Defendant
Robert A. Riddell.

It Is So Ordered this 28th day of December, 1956.

/s/ BEN HARRISON,
Judge. [16]

[Endorsed]: Filed December 28, 1956.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT IN INTERVENTION

Comes now the defendant in intervention, Marty W. Landau, and in answer to plaintiff in inter-

vention's complaint on file herein, admits, denies and alleges as follows:

I.

Answering defendant in intervention denies generally and specifically, each and every, all and singular, conjunctively and disjunctively, the allegations contained in said complaint in intervention, and the whole thereof, particularly denying, but without limiting the generality of the foregoing denial, that answering defendant in intervention is indebted to plaintiff in [17] intervention in the sum of $4,450.00, or any greater or lesser sum, or any sum at all.

Wherefore, answering defendant in intervention prays that plaintiff in intervention take nothing by its complaint in intervention and that the same be dismissed; that defendant in intervention have judgment for his costs of suit incurred herein, and for such other and further relief as to the Court may seem just and proper in the premises.

ENGER & YARDUM,

/s/ By LE VONE A. YARDUM,

Attorneys for Defendant in Intervention Marty W. Landau. [18]

Duly Verified.

Affidavit of Service by Mail Attached. [19]

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

DECISION

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment will be against the plaintiff as follows:

(a) That plaintiff take nothing by the Complaint against the defendant, and

(b) That plaintiff in intervention, the United States of America, do have and recover from the plaintiff, under its Complaint in Intervention, the sum of $4450.00 with penalties and interest according to law. Computation of total tax to be made by counsel under Local Rule 7(h). Costs to the defendant and plaintiff under intervention.

Formal Findings and Judgment to be prepared by counsel for the defendant and plaintiff in intervention under Local Rule 7. [20]

Comment

I am of the view that the plaintiff was subject to the cabaret tax imposed by Section 1700(e)(1) of the 1939 Act for the period December 1, 1949, to November 1, 1951.

While decisions from other Circuits are not necessarily binding, I am satisfied that the two Courts of Appeals which passed on the applicability of the tax to persons who, like the plaintiff, conducted dance halls, were correct in holding that such establishments were subject to the cabaret tax. [26

U.S.C.A., I.R.C., §1700(e)(1). See, Avalon Amusement Corporation v. United States, 7 Cir., 1948, 165 F. 2d 653; Birmingham v. Geer, 8 Cir., 1950, 185 F. 2d 82] So I do not hesitate to adopt their interpretation.

In the light of these decisions, the decision in the lower court in Geer v. Birmingham, D. C. Ia., 1950, 88 F. Supp. 189, which was specifically reversed by the Court of Appeals in Birmingham v. Geer, supra, and the fact that a Committee of the Congress, subsequent to the promulgation of the decisions, may have stated that the lower court's opinion accords with congressional intent, while those of the Courts of Appeals do not, loses all meaning. When Courts and the Congress disagree on statutory interpretation, the only way in which the conflict can be resolved is for the Congress to change the law. Otherwise, the opinion of the Courts must prevail. For the Congress cannot tell courts to interpret a statute in a certain manner. It speaks only through the language of the statute. And where the language is clear, [21] legislative history before the passage of the Act loses all significance, and attempted legislative interpretation after the passage of the Act carries no weight. [See, Greenwood v. United States, 1956, 350 U. S. 366, 374; United States vs. McKesson & Robbins, 1956, 351 U. S. 305, 315.] The Congress of the United States did make its interpretation of the Section under consideration prevail in the only manner permitted,—namely, by amending it in 1951 so as to specifically exempt from the tax ballrooms,

dance halls or other similar places where the service of food and refreshments are incidental only.

We are asked to interpret the Act retrospectively so as to grant relief to the taxpayer. Two considerations stand in the way: (1) The fact that no statute, not even a tax statute, is given retrospective effect unless it is such by its very terms, and (2) the Congress itself in amending the Act, stated that it shall be effective prospectively only. The language it used reads:

> "The amendment made by subsection (a) shall be applicable only with respect to periods after 10 antemeridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act."

The Court of Appeals for the 8th Circuit, the same Court which decided Birmingham v. Geer, supra, had occasion to pass upon this matter also in a group of consolidated cases which are reported under the title Peony Park v. O'Malley, 8 Cir., 1955, 223 F. 2d 68. It held that the particular statute was not retrospective. Certiorari in the case was denied by the Supreme Court. [Peony Park v. O'Malley, 1955, 350 U. S. 845] [22] I agree with this conclusion.

In the light of what precedes, the position of the plaintiff in this case is not tenable.

Hence the ruling above made.

Dated: May 2, 1957.

/s/ LEON R. YANKWICH,
Chief Judge. [23]

[Endorsed]: Filed May 2, 1957.

United States District Court, Southern District of California, Central Division

No. 20341-BH Civil

MARTY W. LANDAU, doing business as RIVERSIDE RANCHO, Plaintiff,

vs.

ROBERT A. RIDDELL, etc., Defendant.

UNITED STATES OF AMERICA, Plaintiff in Intervention,

vs.

MARTY W. LANDAU, etc., Defendant in Intervention.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on for trial on April 29, 1957, before the Hon. Leon R. Yankwich, Chief Judge, presiding, without the intervention of a jury. Plaintiff was represented by his counsel, Enger & Yardum, by LeVone A. Yardum, and the defendant was represented by his counsel, Laughlin E. Waters, United States Attorney, Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and John G. Messer, Assistant United States Attorney. The Court, having heard and considered all the evidence, stipulation of facts, memoranda and argu-

ments of counsel, makes the following findings of fact and conclusions of law: [24]

Findings of Fact

I.

The plaintiff, Marty W. Landau, was a citizen of the United States, and a resident of the County of Los Angeles, State of California.

II.

At all times herein involved, plaintiff was an individual doing business under the fictitious name and style of Riverside Rancho, located at 3213 Riverside Drive, within the City of Los Angeles, County of Los Angeles, State of California. Said establishment provided dancing privileges and sold food, refreshment and checkroom service to those patrons desiring to avail themselves of such privileges, services, and merchandise.

III.

During the period December 1, 1949, to November 1, 1951, plaintiff filed excise (cabaret) tax returns and paid said taxes in the total sum of $19,590.93.

IV.

On January 25, 1954, plaintiff filed a claim for refund of said excise taxes in the amount of $19,590.93. On March 15, 1956, said claim for refund was rejected.

V.

In 1954, the Commissioner of Internal Revenue assessed additional excise (cabaret) taxes in the

amount of $4,564.16, against plaintiff, for the period October, 1950 through October, 1951, together with interest thereon in the amount of $766.33, or a total of $5,330.49. At various times during the year 1955, plaintiff made payments against said additional assessment in the total amount of $880.49 only, resulting in a balance in the amount of $4,450.00 due and owing to the United States of America, with penalties and interest thereon according to law. [25]

VI.

On December 28, 1956, the United States of America, by leave of court, filed its complaint in intervention against plaintiff to recover said excise tax in the amount of $4,450.00, together with penalties and interest thereon according to law.

VII.

Plaintiff was subject to the cabaret tax imposed by Section 1700(e)(1) of the Internal Revenue Code of 1939 for the period December 1, 1949, to November 1, 1951.

VIII.

Plaintiff did not sustain his burden of proving that his establishment was not subject to said cabaret tax during the period herein involved.

IX.

Plaintiff, during the period December 1, 1949 to November 1, 1951, was properly assessed a tax, correctly computed, of 20 per centum of all amounts paid for admission, refreshment, service, or merchandise at his establishment, Riverside Rancho,

by or for any patron or guest who was entitled to be present during any portion of the public performances for profit which plaintiff furnished at said Riverside Rancho during said period.

X.

The United States of America, plaintiff in intervention, sustained its burden of proving that plaintiff was, and now is, liable for the additional cabaret tax assessed for the period October, 1950 through October, 1951, in the sum of $4,450.00, together with penalties and interest according to law, which were properly imposed.

XI.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and incorporated herein as findings of fact. [26]

Conclusions of Law

I.

The Court has jurisdiction of the subject matter and of the parties hereto.

II.

Plaintiff did not sustain his burden of proving that his establishment was not subject to the cabaret tax imposed by Section 1700(e)(1) of the Internal Revenue Code of 1939 during the periods herein involved.

III.

Plaintiff was, and now is, liable to the United States of America, plaintiff in intervention, for

additional cabaret tax assessed for the period October, 1950 through October, 1951, in the sum of $4,450.00, together with penalties and interest thereon according to law.

IV.

Plaintiff was subject to the cabaret tax imposed by Section 1700(e)(1) of the Internal Revenue Code of 1939 for the period December 1, 1949, to November 1, 1951.

V.

The amendment to Section 1700(e)(1), specifically exempting from the cabaret tax ballrooms, dance halls or other similar places where the serving and selling of food and refreshments are incidental only, is applicable only with respect to periods commencing November 1, 1951. [Peony Park v. O'Malley, 223 F. 2d 68, (8th Cir. 1955), Cert. denied, 350 U. S. 845]

VI.

Plaintiff is not entitled to any refund of cabaret tax for the period herein involved. Defendant is entitled to judgment dismissing the complaint herein, with prejudice, together with his costs. [27]

VII.

The plaintiff in intervention, United States of America, is entitled to recover from plaintiff additional cabaret tax assessed against plaintiff for the period October, 1950 through October, 1951, in the amount of $4,450.00, together with penalties and interest according to law.

VIII.

All findings of fact which are or are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

(a) That the plaintiff take nothing by his complaint against defendant, and that the above-entitled action be dismissed with prejudice;

(b) That plaintiff in intervention, the United States of America, do have and recover from the plaintiff, under its Complaint in Intervention, the sum of $5,327.22, with interest thereon at $0.73 per day from the date of this judgment, until paid, plus $0.50 for lien filing fee; and

(c) That the defendant have judgment for and shall recover from plaintiff the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of $20.00.

Dated: This 15th day of May, 1957.

/s/ LEON R. YANKWICH,
Chief United States District
Judge. [28]

Affidavit of Service by Mail Attached. [29]

[Endorsed]: Filed May 15, 1957. Docketed and Entered May 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Marty W. Landau, doing business as Riverside Rancho, plaintiff and defendant in intervention in the above entitled action, hereby appeals to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from the Judgment entered in said action on May 16, 1957, in favor of defendant and against the plaintiff, and also, the judgment rendered in said action in favor of plaintiff in intervention and against the defendant in intervention, and from the whole of said judgments.

Dated: July 15, 1957.

/s/ CLINTON F. SECCOMBE,
Attorney for Plaintiff and Defendant in Intervention. [33]

Acknowledgment of Service Attached. [34]

[Endorsed]: Filed July 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 39, inclusive, containing the original:

Complaint

Answer

Complaint in Intervention

Answer to Complaint in Intervention

Decision

Findings of Fact, Conclusions of Law and Judgment

Substitution of Attorneys

Notice of Appeals

Designation of Contents of Record on Appeal

Request for extension of Time for Filing Record on Appeal, etc.

B. Plaintiff's Exhibits 1, 2, 3, 4. Defendant's Exhibits A, B, C, D.

C. One volume of Reporter's Transcript of Proceedings had on April 29, 1957.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 3rd day of September, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ By WM. A. WHITE,
Deputy Clerk.

In the United States District Court, Southern District of California, Central Division

No. 20341-BH Civil

MARTY W. LANDAU, doing business as RIVERSIDE RANCHO, Plaintiff,

vs.

ROBERT A. RIDDELL, etc. Defendant.

UNITED STATES OF AMERICA, Plaintiff in Intervention,

vs.

MARTY W. LANDAU, etc., Defendant in Intervention.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Monday, April 29, 1957 [*]
2:00 P.M.

Honorable Leon R. Yankwich, Judge Presiding.

Appearances: For the Plaintiff and Defendant in Intervention: Enger and Yardum, by Clifford E. Enger, Esq., and LeVone A. Yardum, Esq., 9405 Brighton Way, Beverly Hills, California. For the Defendant and Plaintiff in Intervention: Laughlin E. Waters, United States Attorney, by John G. Messer, Assistant United States Attorney.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

The Clerk: Case No. 20341-BH Civil, Marty W. Landau v. Robert A. Riddell, etc.; and United States of America, intervening plaintiff, v. Marty W. Landau, intervening defendant, for trial.

Mr. LeVone A. Yardum,—is that correct?

Mr. Yardum: Correct.

The Clerk: And Mr. Clifford E. Enger,—is that correct?

Mr. Enger: Correct.

The Clerk: And Mr. John G. Messer for the Government.

Mr. Messer: Yes.

The Court: Gentlemen, I have gone over the file. Is there any additional testimony to be presented other than that which is contained in the statement of facts and the exhibits which you have attached to them?

Mr. Yardum: Yes, your Honor, there will be.

The Court: Then you take charge and introduce the statement of facts and the exhibits for the plaintiff, and the Government will offer those offered by them. I have gone over them, and the three briefs filed.

Mr. Yardum: I am not familiar with your practice here, your Honor. Do I have to introduce these exhibits into evidence?

The Court: That is right. They have to be [3] introduced. The statement of facts will be given your Exhibit No. 1, and then your other exhibits will be designated by number, and then the Government's exhibits will be offered as a part of their case. Then we know what we are starting with.

The Clerk: Shall I number those, Judge?

The Court: If there is no additional testimony, yes. Sometimes we don't do that, but when there is additional testimony you have to offer the stipulated facts.

Mr. Yardum: The plaintiff will offer in evidence the stipulation of facts which has heretofore been entered into between the plaintiff and the defendant.

The Court: Give us the file date.

Mr. Yardum: It was filed on December 14, 1956.

The Court: It may be received as Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.)

[See pages 59-66.]

The Court: Then we will take your exhibits. I think you have numbered them.

The Clerk: I haven't got them numbered yet, your Honor. I think I had better number them in order to keep them orderly.

The Court: All right. You take them.

The Clerk: Shall I number the photographs as one exhibit?

Mr. Yardum: Yes, that is satisfactory. [4]

The Court: You can mark them No. 2, and then give them letters.

The Clerk: Are these the only exhibits that you have?

Mr. Messer: And we have some which are already on file.

The Clerk: When were they filed?

Mr. Messer: The Government's exhibits——

The Court: They are there, right following.

The Clerk: I have them.

The Court: All right.

The Clerk: There have been marked for identification Plaintiff's Exhibits 1, 2, 3 and 4, and there have also been marked for identification Defendant's Exhibits A, B, C and D.

(The exhibits referred to were marked Plaintiff's Exhibits 2, 3 and 4, and Defendant's Exhibits A, B, C and D, for identification.)

Mr. Yardum: If your Honor please, at this time we would like to introduce into evidence as Plaintiff's Exhibit No. 1 a stipulation of facts entered into between the plaintiff and the defendant, and filed in this court on December 14, 1956.

The Court: It may be received.

Mr. Yardum: I would like to offer as Plaintiff's Exhibit 2 a sketch of the floor plan of the Riverside Rancho Ballroom. [5]

The Court: It may be received.

(The exhibit heretofore marked Plaintiff's Exhibit 2, was received in evidence.)

Mr. Yardum: I next offer as Plaintiff's Exhibit 3 a series of eight photographs of different portions of the Riverside Rancho. They are all marked Exhibit C on the sheets here. I believe that should be changed.

The Clerk: Those are Exhibit 3.

Mr. Yardum: Exhibit 3. I notice on the bottom they are marked No. C.

The Clerk: That is not the way we have them. May they be received in evidence, your Honor?

The Court: They may be received.

(The exhibit heretofore marked Plaintiff's Exhibit 3, was received in evidence.)

Mr. Yardum: I next offer as Plaintiff's Exhibit 4 the plaintiff's claim for refund—the original of the plaintiff's claim for refund of the excise taxes which are the subject of this action.

The Court: All right. It may be received.

(The exhibit heretofore marked Plaintiff's Exhibit 4, was received in evidence.)

[See pages 66-71.]

Mr. Messer: May we at this time offer our exhibits in evidence?

The Court: Let's not do that. If he is going to offer [6] any oral testimony, I would rather have him complete his case, and then you can offer yours.

Mr. Messer: All right.

Mr. Yardum: Mr. Landau. I will call Mr. Marty Landau.

MARTY WOLF LANDAU

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, sir?

The Witness: Marty Wolf Landau, L-a-n-d-a-u.

Direct Examination

Q. (By Mr. Yardum): Mr. Landau, you are the plaintiff in this action, are you not?

(Testimony of Marty Wolf Landau.)

A. Yes, sir.

Q. And are you the proprietor of the Riverside Rancho? A. Yes, sir.

Q. Would you tell the court when you first took over the operation of that Riverside Rancho?

A. In April of 1948, after it burnt down. It burnt down in 1947, and I took it over in 1948 and rebuilt it.

Q. Now, these excise taxes, for which you have brought an action to recover, were these taxes paid under protest, Mr. Landau? [7]

A. Yes, they were, every one of them. I can give an explanation for that, if the court will allow me.

Q. Yes, you may.

Mr. Messer: Your Honor, may I object to this here? I don't believe that it is necessary to go into all of these taxes. I mean, we haven't raised any issue as to when these taxes were paid.

The Court: There was no question raised about the timeliness of it.

Mr. Yardum: It was denied in the answer.

The Court: I beg your pardon?

The Witness: Originally the claim was for $58,000, your Honor.

The Court: All right. In view of the fact that it is denied in the answer, you may go ahead.

Q. (By Mr. Yardum): Just explain to the court how these taxes were paid under protest.

A. Originally there was a Mr. Clayton up in the tax office. I went up to see Mr. Clayton, and

(Testimony of Marty Wolf Landau.)

asked him to come down right after the fire and look the ballroom over.

Prior to that time the gentleman that had it had tables and chairs and entertainment in the ballroom. Downstairs he had an Esquire Room, with entertainment, and upstairs in the dining room, which was at that time called the Hawaiian Hut, he had a band and entertainment up there. [8]

So I went to see Mr. Clayton about it. He said, "Well, I will come out and look at it for you."

He come out there, and looked at it, and he said, "Well, in order to make this a separate building, I don't think you will have to worry about paying a cabaret tax, I would build a complete wall," where there was two entrances that you could get in and out from the bar.

Mr. Messer: Your Honor, I object to the testimony as to the statements made by Mr. Clayton, as to what he should do in the establishment. I don't believe that would be proper evidence at this time, and is entirely hearsay.

The Court: The Government is not estopped by any statement by an agent that a certain thing is taxable or not taxable, because no one short of the Secretary of the Treasury can determine that matter. If there was a question of bad faith, I think it might go to the good faith of the taxpayer, but that isn't the question.

Mr. Yardum: The question here is, your Honor,——

The Court: I beg pardon?

(Testimony of Marty Wolf Landau.)

Mr. Yardum: The only point here is that we want to bring out, if the court will allow us, that Mr. Landau constructed or reconstructed this ballroom pursuant to instructions which he received from the Treasury Department.

The Court: That would not determine taxability, unless the Secretary of the Treasury himself did that, and I doubt [9] even if the Secretary of the Treasury could waive a tax.

I think I will let it go in, but merely as going to his good faith in making this claim and in paying under protest. I will let it go to that, but there is no estoppel arising against the Government, because there are thousands of subalterns in the Internal Revenue Department, and there are hundreds in this District, and because someone makes a statement to this man that if he did certain things he would not have to pay a tax would not govern. If that were true, we would be trying every day the question of whether a certain person in the Department had promised immunity, which he had no right to do. No one can bind the United States Government in that manner.

However, I will allow it to go in merely as an indication of good faith.

Mr. Yardum: We shall offer it for that purpose, your Honor.

The Court: All right.

Mr. Messer: I understand that Mr. Clayton is now dead, and we would have a bad time trying to refute anything that the man may have said.

(Testimony of Marty Wolf Landau.)

The Court: Well, I will allow it merely as going to good faith. Go ahead.

The Witness: Then after Mr. Clayton became very ill, Mrs. Herbell was in the department, and I was turned over to [10] Mrs. Herbell, and she said—Mrs. Herbell told me that she had talked to Mr. Clayton, and that Mr. Clayton had advised her that if I was going to pay the cabaret taxes, I should take these forms and split it up as to which was admission taxes—on these forms that I don't recall the numbers of.

Will you look it up there, counsel, and see what they are? I can't remember the numbers. That is from the day I went into business, to put it on the yellow forms that you have in front of you there, and those forms they advised me—Mrs. Herbell advised me to split them up, showing admission taxes and cabaret taxes, which I did.

I did that there from approximately 1948 to 1949. I kept asking Mrs. Herbell to get someone out there to give me a decision, because I was paying these taxes out of my own pocket.

So finally Mr. O'Connor come out there. Mr. O'Connor come out there, and he looked it over, and he says, "You know that you certainly have changed this building." He says, "I am the one that originally assessed the former owner here $16,000 for cabaret tax."

So Mr. O'Connor advised me to take pictures of the Riverside Rancho, and that he would try to get

(Testimony of Marty Wolf Landau.)
me a decision if I was liable under the cabaret tax or not.

We met there with the photographer, and we took these pictures of the Riverside Rancho. At that time Mr. O'Connor [11] helped me fill out a claim for $58,000.

We sent it in, and I waited from 1949, '50, 51, '52 and '53. I kept asking the Government, and bothering the Government, and everything.

In the meantime Mr. O'Connor come out to see me again. He was sent out there. He checked all my books, and even during checking my books there, he found a deal where I used to have ladies 20 cent a night, and I had given the Government the whole 20 cents, and he wondered why I had done that. He said I should only have given 20 per cent of 20 cents, which was four cents. So I put in a claim for $4800 on that.

Prior to that time I was paying cabaret tax on private parties.

Mr. O'Connor took me in to Mr. Dinsmore, and finally, after about six or eight months, I got a letter from Mr. Dinsmore telling me that I did not have to pay any cabaret tax at all on the private parties. As long as eight months had already been paid, and there was $700 more I put a claim in for. Nothing was heard of it.

Then I hired an attorney who had just won a case where a Mr. McDonald, an agent, went into the 97th Street Corral and assessed them for $58,000 taxes.

(Testimony of Marty Wolf Landau.)

Mr. Messer: I object to that.

The Court: We are not interested in that. That may go [12] out. Any dealings you had with the Government will be allowed to go in.

The Witness: Then in 1953 Mr. O'Connor called me again and said he was coming out there, and he come out there, and he had orders to check me.

In the meantime I had stopped paying cabaret tax for a period of seven or eight months in order to try to get a decision from the Government if I was a cabaret or not, because at that time, when Mr. Hammond was going to take my case, he said, "Well, you better hurry up, because a lot of this time on the limitations will run out on this $58,000, if you want me to handle this case."

Well, I was advised that I didn't have to have an attorney to handle it, that the Government would help me prepare it, which they did. So I went ahead and in 1952—well, prior to that time on the $4800 refund, a Mr. Smith, who was in the department, checked me for five days out there, and he told my wife and myself and my secretary that I had a legitimate claim, and he was going to recommend a refund of the $4800.

I waited, four, five, six months and couldn't get anything. Finally I got Mr. Smith on the telephone, and asked him what happened. He said, "My superiors changed my mind for me." He said, "We are in the collection agency business here, and not to give money back to people." [13]

So finally Mr. O'Connor come back in 1953, and

(Testimony of Marty Wolf Landau.)
checked my books for ten days, and when he found out I hadn't paid a cabaret tax, he said, "Didn't you get a letter from the Government?"

I said, "No, I didn't get a letter from the Government."

He said, "Well, somebody slipped up. This copy of the letter is in the files here from 1951."

So that is my case, your Honor.

Mr. Yardum: I think you have answered the question sufficiently, Mr. Landau. There is only one other thing I would like to clear up in connection with the restaurant, the dining room at the Riverside Rancho.

Your Honor please, I want to bring this out because I don't believe the stipulation was entirely clear on this point.

Q. The dining room, where was that located in the building, in this area?

A. There is an outside entrance from the street to get into my dining room.

Q. And is there another entrance there?

A. From the ballroom downstairs. You have to walk upstairs, and it is about 100 or 150 feet away from my entertainment.

Q. Ordinarily, or generally, would a person have to pay an admission to get into this area? [14]

A. If they went in there to this dining room, they would not have to pay an admission, but if they wanted to get into the ballroom, they would have to go into the office to get a ticket to dance,

(Testimony of Marty Wolf Landau.)

and all we had there was dancing, and no entertainment.

Q. Supposing a customer wanted to have dinner at 6:30 p.m., would he have to pay an admission to get into the dining room?

A. No, no admission.

Q. And then could he walk back into the ballroom?

A. No, he would have to go outside and purchase an admission ticket.

Q. After the general box office opened, could they still get into the dining room free of charge?

A. After he paid an admission,—well, we locked the outside after the music would start at 8:30, and they would have to go to the ballroom and purchase a ticket there, and then they could go down to the dining room, but then it was just a dining room.

I might state at this time that I think Mr. O'Connor knows the years that I have dealt with them, and he has really tried to help me on this case, your Honor. He felt that I had a legitimate claim, and he really tried to help me.

Mr. Messer: I object to what Mr. O'Connor did, or what he felt. I don't think that is proper testimony. [15]

The Court: Unfortunately, these things are not decided on the basis of what a particular officer may say. The only time they are brought in is when a penalty is imposed, and somebody delays, and a question of wilful neglect to pay a tax is

(Testimony of Marty Wolf Landau.)

involved. Then, of course, the fact that a person acted even under the advice of a reputable attorney may be considered.

For instance, I recently held in a case where people had failed to pay a tax because counsel had advised them that they were not subject to a tax, that no penalty should be imposed, because there was reasonable excuse for the situation. But we do not have any such situation here.

Now, let us go on.

Q. (By Mr. Yardum): One other thing, Mr. Landau. There is a door, is there not, a five-foot door between the liquor bar and the ballroom?

A. Yes, sir. The fire department wouldn't let me block that whole wall out, so they insisted that I put that five-foot door there for an exit.

Mr. Yardum: I have no further questions.

The Court: Any cross examination?

Cross Examination

Q. (By Mr. Messer): Mr. Landau, I believe you testified that the dining room was open. You didn't specify the hours, as I understand [16] it, that the dining room is open.

A. From 6:00 to 8:30 in the evening.

Q. From 6:00 to 8:30 in the evening. Then when you opened the entrance to the entire enclosure, you closed the public door, the outside door? A. That is right.

Q. But after a person purchased a ticket of admission, that entitled him to go into the dining

(Testimony of Marty Wolf Landau.)

room area, after he goes into the fenced-in area?

A. Yes.

Q. And that fenced-in portion includes all portions of the Riverside Rancho?

A. The dining room was a separate building.

Q. But they are all enclosed within one enclosure, one fence, one barrier?

A. That's right, sir.

Q. After the patron enters by the main entrance from the street into the entire enclosure, and pays the admission fee, they are entitled to all facilities there, are they not? They may buy whatever you might sell at the milk bar, or the liquor bar, or may enter the dance area, too, isn't that true?

A. That's right, sir.

Q. And no extra admission charge is charged anyone to enter into the building containing the dance area; isn't that [17] true?

Mr. Yardum: I object to that. All that is stipulated to, your Honor.

Mr. Messer: That is stipulated to. However, there are other things that were gone into, and I was just clarifying it.

The Witness: Will you repeat that question, please?

Q. (By Mr. Messer): Once the patron or customer has paid his admission fee at the main entrance to the enclosure,—by the way, what is that admission fee?

A. The admission fee was $1.20. It has Government tax.

(Testimony of Marty Wolf Landau.)

Q. And once the patron pays that and enters the enclosure, the fenced-in area, that gives him the right to enter any other building within that area without any additional charge, does it not?

A. Yes, it does.

Q. And he may avail himself of all the facilities, and purchase some food, liquor, or anything that is being sold; isn't that right?

A. If they are of age.

The Court: And after 8:30 that is the only way he could get even into the dining room, isn't that true?

The Witness: That is right.

The Court: All right.

Mr. Messer: Nothing further. [18]

The Court: Have you anything further?

Mr. Yardum: I have nothing further, your Honor.

(Witness excused.)

Mr. Yardum: The plaintiff rests.

The Court: All right, Mr. Messer.

Mr. Messer: I would like to call the agent, Mr. O'Connor.

The Court: Do you want to offer your exhibits now?

Mr. Messer: Yes, your Honor.

BERNARD JEFFERSON IRVINE O'CONNOR called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

(Testimony of Bernard Jefferson Irvine O'Connor.)

The Clerk: What is your full name?

The Witness: Bernard Jefferson Irvine O'Connor.

The Clerk: How do you spell Irvine?

The Witness: I-r-v-i-n-e.

Mr. Messer: The defendant offers at this time, your Honor, Defendant's Exhibit A, a schedule of receipts.

The Court: It may be received.

(The document referred to was marked Defendant's Exhibit A, and received in evidence.)

Mr. Messer: And as Exhibit B, a certificate of assessments and payments known as Form 899.

The Court: It may be received. [19]

(The document heretofore marked Defendant's Exhibit B, was received in evidence.)

Mr. Messer: And as Exhibit C, claim for abatement in the amount of $4450.

Mr. Yardum: If the Court please, may I see that? I don't believe that that is stipulated to.

Mr. Messer: Oh, excuse me. This was the original filed by the plaintiff.

Your Honor, we filed them for identification, but it is the original from the plaintiff, and it was in our file.

Mr. Yardum: Yes, that was stipulated to.

The Court: It may be received.

(The document heretofore marked Defendant's Exhibit C, was received in evidence.)

[See pages 72-74.]

(Testimony of Bernard Jefferson Irvine O'Connor.)

Mr. Messer: And as Exhibit D, the returns filed by the plaintiff on the taxes.

The Court: All right.

(The document heretofore marked Defendant's Exhibit D, was received in evidence.)

Direct Examination

Q. (By Mr. Messer): Mr. O'Connor, I believe it was testified that you audited the books of the Riverside Rancho, of the establishment?

A. Yes. [20]

Q. Did you at any time that you audited these books, or at any other time, advise the plaintiff as to how to so construct or remodel his establishment as to prevent the imposition of any cabaret or other tax?

Mr. Yardum: I will object to that, your Honor.

The Witness: No.

The Court: How is that?

Mr. Yardum: I will object to that as being irrelevant and immaterial, your Honor.

The Court: The plaintiff implied that ever since he began everybody told him that, and while he didn't say O'Connor did that, or, he said O'Connor was of the view that he should not pay it, or something like that, with one man being dead, let's get to the last man.

Overruled.

Q. (By Mr. Messer): Will you answer?

A. No.

The Court: The answer is, "No." All right.

(Testimony of Bernard Jefferson Irvine O'Connor.)

Q. (By Mr. Messer): Now, Mr. O'Connor, during the time you were——

The Court: As a matter of fact, isn't it the policy of your department that you are not to advise whether a tax is due or not?

The Witness: You may advise, your Honor, if there is no question. [21]

The Court: If there is no question?

The Witness: If there is a question, it is advisable to confer with your superior until you are of a sure mind, and then make your determination.

The Court: I see. All right.

Q. (By Mr. Messer): During the time that you were auditing these books, did you recommend additional assessments in the amount of $4450?

A. Yes, I made recommendations for, I think, two additional assessments at two different times.

The Court: Was that one of them, or did they total that?

The Witness: I think there are two different totals, your Honor.

The Court: Two different totals.

Mr. Messer: May I hand these to the judge?

(Handing documents to the court.)

The Witness: That is one total, and I think there was another one. I made recommendations at one time for an assessment of cabaret tax for six or seven months. Those are the months in which payment was made for admissions tax only, and no payment was made for cabaret tax. So I recommended that the cabaret tax for those par-

(Testimony of Bernard Jefferson Irvine O'Connor.)
ticular months be assessed, and I think Mr. Landau paid that.

The Court: All right.

The Witness: Then at another time the question arose as [22] to a credit which was taken, in the amount of some $5000, or thereabouts, for payment of 20 cents as tax, which under an interpretation as a cabaret wouldn't have been due. In other words, the 20 cents which was paid was 20 cents collected as a tax on free admissions, and that would have been properly due under the interpretation that admissions' tax was due.

However, since the Board and the local office had held that this establishment was subject to the cabaret tax, I made the determination on that 20 cents, to be that 3.2 cents of the 20 cents represented tax, and the balance represented income to the taxpayer, and on that basis I recommended that the claim—that a claim be allowed for that.

During that examination, which covered an extended period of time, I think the net result of that was that there was a recommendation made for additional cabaret taxes amounting to $4564.16.

Now, I had given the taxpayer credit for the difference between the three and two-thirds cents and 20 cents.

Q. (By Mr. Messer): The net deficiency, then, allowing for credits and all and the admission tax was $4,450; is that right? A. Yes, $4,564.16.

The Court: And that was the amount? That

(Testimony of Bernard Jefferson Irvine O'Connor.)

was washed against what he owed for that year or for the seven months? [23]

The Witness: Yes, that was the reduced amount.

The Court: The reduced amount. All right.

Q. (By Mr. Messer): And is that the amount shown and concerning which the claim for rebate was filed?

A. Well, as I say, that amount was assessed. That is $4,516 and 4,554.16 was assessed, together with interest, which amounted to, I think, some $5300. The $880 of that was paid, and the $4,550 has not been paid, and, therefore, I think that this claim here is a claim for abatement of—I mean a refund for $880, and abatement of $4,450. That is probably the outstanding balance at this time.

Mr. Messer: Your Honor, I ask, and I want to clarify this: This is testimony in connection with our claim of intervention. That is additional tax that was assessed against the plaintiff.

The Court: All right.

Mr. Messer: Then, as I understand it, and correct me if I am wrong as to the amounts——

The Court: Well, I haven't looked at the figures, but they are identical with the figures you plead on page 3 of your complaint, isn't that true,—$4,450?

Mr. Messer: Yes, your Honor, that is the amount that has been assessed, but not paid.

The Court: I noticed that. Anything further from this witness?

Mr. Messer: I think there is nothing further.

The Court: Any questions?

Mr. Yardum: No questions.

The Court: All right, Mr. O'Connor.

(Witness excused.)

The Court: Any other testimony on the part of the Government?

Mr. Messer: No, your Honor, I believe that is all.

The Court: I will declare a short recess, and then I will hear any argument that you have.

I want to say, gentlemen, that I have studied your briefs, and when I read the briefs it occurred to me that possibly a case that was decided last week might help, but it does not do so.

You get these slip decisions, don't you?

Mr. Messer: Yes, your Honor.

The Court: It is the Automobile Club of Michigan, decided April 22, 1957. You know when you read a thing, you just build up a faint impression. Then when I read your briefs, it occurred to me that it might bear on it, but all this does is merely to say that the Commissioner has the right to revoke a ruling and make a tax retroactive.

Mr. Messer: Yes, your Honor.

The Court: And that is not involved here.

Mr. Messer: No.

The Court: The question is whether Congress by subsequently [25] repealing it sort of retroactively gave relief to a taxpayer who had paid it, under what the Congress said was an erroneous interpretation.

Mr. Messer: That is right. We have the case, and I have got the Supreme Court decision.

The Court: Which?

Mr. Messer: The one that you referred to.

The Court: It came down on the 22nd. Do you want to see it?

Mr. Messer: I was waiting to see that.

The Court: This does not bear on this.

Mr. Messer: No, it bears on the other ruling by the Commissioner.

The Court: Yes, it is sustained by a divided court.

Mr. Messer: It sustained it.

The Court: Yes, it sustained it.

Mr. Yardum: If your Honor please, I should like to see it.

The Court: Yes, go ahead. You look at it during the recess. I have to keep up with you boys, you see.

(A short recess.)

The Court: Now, gentlemen, I will hear any argument you desire to present. I have read your briefs, and I think the only question really involved is whether, when the law was changed that was an indication that the law before should [26] have been interpreted the same way. The courts have not agreed. The higher courts have said that meant nothing. Before they changed the law, Congress said that two of the circuits have misinterpreted their meaning, but they didn't get around to changing it.

I am reminded of a statement made in an antitrust case by Justice Reed last year. It was in United States vs. McKesson-Robbins. It was an

antitrust case, and it cited some of the debates in order to sustain the lower court, which had dismissed the action on the ground that it didn't apply to a particular situation. While Justice Reed referred to the colloquy between Senator Sparkman and Senator Humphrey as to the meaning of the amendment to the McGuire Act, he said that legislative history and legislative statements do not help when the language is plain and not ambiguous.

I will hear what you have to add to your argument, gentlemen.

Mr. Yardum: If the Court please, I have very little to add. In fact, I don't think that I can add anything to that. I am sure, from listening to your Honor talk, that you have a grasp of what our problem is.

The Court: I am glad I had the time, gentlemen, because Mr. McHale knows how busy I have been, but I did have the time, and I studied your memos. Your final memo did not [27] come in until this morning, but I studied that one, too, and I looked at the exhibits and familiarized myself with what the case is all about.

Mr. Yardum: However, we only feel that the decision, the District Court decision in Geer v. Birmingham was a magnificent decision, and we feel that decision should be followed, and that when Congress reworded the law, or added the words, that they were merely declaring their intent and purpose all the time. And I believe that our authorities go to that purpose.

The Court: All right, Mr. Messer.

Mr. Messer: Your Honor, we feel, as you have said, that really this case revolves actually about a question of law entirely, and had it not been for our complaint in intervention, I believe so far as we are concerned, it could have been submitted on the briefs and the law involved, for the reason that the determinative date in this case, I believe, is November 1, 1951, when the statute was amended.

As we have outlined in our brief, we feel that since this refund for taxes was for the period prior to November 1, 1951, that is the case.

The Circuit Court in Birmingham versus Geer reversed the case, or Geer versus Birmingham, which is really a very fine opinion. I have read it. It is about 45 pages long, and it is very helpful, and is a very learned and [28] exhaustive opinion. However, the Circuit Court felt that it was not a proper interpretation of the statute as it then read.

So Congress, to prevent a broad construction of the statute insofar as ballrooms and dance halls were concerned, amended the statute, but in that amendment it expressly provided that the amendment was only to be effective from November 1, 1951.

I think the Peony Park case, in which nine cases were consolidated for purposes of appeal, held that that statute is prospective only,—the amendment is prospective only, and is not retroactive. But the Birmingham versus Geer and Avalon Amusement Corporation cases properly interpreted the law as it existed prior to the amendment, and that the new

amendment would apply only to situations subsequent to November 1, 1951.

We feel that that is the determinative issue here, that it is one of law, and the interpretation of that amendment, whether it applies to all of these so-called ballrooms and dance halls going clear back, if they are within the statute of limitations where they can all now come in and file suits for refund because of that amendment, and we don't feel that is possible under the amendment.

The Court: Of course, following this decision here in the Michigan Automobile Club case, I presume that if the Commissioner has a right to make a statute retroactive, of [29] course, the Congress also has that power. But before you make a statute retroactive, it must be clear that it was intended so to apply it. The very fact that Congress, despite its previous criticism of the two Circuit Court decisions which had arisen under it, found it necessary to amend the law, indicates that they felt regardless of the difference between them and the courts, ultimately the courts' opinion would prevail.

Mr. Messer: I don't believe, your Honor, that that is what the Congress intended, and what the cases have decided on that amendment since it was passed, but that it provides in the statute itself it shall be effective only from a certain date. I think that Congress intended by the amendment to mean that it is a clarification of the existing law.

The Court: Is that specific language in the new statute?

Mr. Messer: Yes, your Honor, it is very specific, and the Peony Park case took that very question up and decided that it was a prospective statute only.

The Court: I know the decision, but I am talking about the statute.

Mr. Messer: Yes. The statute is Section 404 of the Revenue Act of 1951, amending Section 1700(e) (1).

The Court: Is that on page 4 of your memorandum?

Mr. Messer: Yes, it is on page 4. [30]

The Court: "The amendment made by subsection (a) shall be applicable only with respect to periods after 10 antemeridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act."

Is that what you refer to?

Mr. Messer: Yes, your Honor. That was the very section that was up before the court in the Peony Park case, which had nine different actions, all similar, consolidated for purposes of appeal.

The court was very specific concerning that, because the same argument was made there as made here, that it was simply a clarification of the existing law, and the court said, no, ordinarily the rule is that a statute and an amendment thereto would be considered prospective only, and in this case pointed out that the statute itself specified that it shall apply only from a definite date, namely, November 1, 1951, and that the cases before it then, which were similar to this case, could not recover

any of the taxes paid prior to November 1, 1951. That the law at that time was specific as to the situation prevailing prior to the amendment, and that the amendment now is new law exempting, definitely exempting certain types of establishment from the application of the cabaret tax, and that it would have been unnecessary for Congress to have placed that section in the amendment if [31] they wanted it to apply to all cases arising before November 1, 1951.

The Court: As I said before, Congress has that power, but ordinarily you do not give retroactive effect even to tax statutes, unless it is quite apparent that it was so intended.

Mr. Messer: That is right, your Honor. I believe, if I remember correctly on that Michigan Automobile Club case, they asked for a ruling that they be a tax exempt organization, and submitted certain facts, and if my memory serves me correctly, the Commissioner did rule that they were a tax exempt organization, but later——

The Court: Changed it.

Mr. Messer: ——changed it, I believe, because they felt that certain facts submitted may not have been as represented at the time of the ruling, and made it retroactive. However, it is my understanding that the Department or that the Internal Revenue Service, when they issue a ruling saying, for example, that a place is not subject to a cabaret tax, or to a manufacturer's excise tax, as we had here in another court a few weeks ago, and they stated that no tax would be collected for the period

within which or during which the ruling was in effect, but they do not go back. I understand that is the practice, and they make a ruling that they will not collect a tax while the ruling is in effect. Only after [32] it is revoked will they start to collect a tax again, which is a very fair and equitable view to take on it.

I think we would have quite a situation if that were not true, because rulings are sometimes made rather hurriedly, I understand, and they are——

The Court: A ruling has a different basis, and they are given the effect of law, because Congress has charged the Treasury Department with the duty to make rulings, and they carry great weight with the court.

Mr. Messer: That is right. I am not speaking now of public rulings which come down, but I am speaking now of private rulings.

The Court: All right.

Mr. Messer: And when they will not collect it during the time the ruling is in effect, the Service will not go back and make it retroactive and collect a tax if they revoke that ruling, because they find sometimes that they were wrong in that original ruling, and many times that has happened. And what the courts have found is that the Government is entitled to the correct interpretation of the law, and what the law is as to the taxing statute, that the courts have that power, and if the court determines it is taxable, that the ruling of the Government does not prevail. But the Commissioner is not bound by any ruling at all in that practice of not

collecting the tax while the ruling is in [33] effect. That is my understanding, and I have seen language to that effect.

We feel, your Honor, that this case, which is an action for refund of cabaret taxes paid prior to November 1, 1951, is barred by the cases which have decided as to what the law was at that time, and all the Circuit Court cases in this field have held for the Government. None of them have been on the side of the taxpayer on this question.

Now, the Birmingham v. Geer case is the outstanding case on this, and, as I said, that is a very exhaustive opinion, and then Congress saw fit, because of the situation that existed at that time to amend the Act. And from my reading on the subject, the field was rather individual as to the rulings under the Act, and the enforcement of this cabaret tax, but in the appeal of the Peony Park case, all nine had appealed, and they were all reversed, and they started collecting taxes again. The actions were broad, and the court determined the amendment was prospective only, and applied to situations since November 1, 1951, and it was not retroactive because the statute itself so provides, even if you disregard the general rule that a statute is prospective in application rather than retroactive.

So, your Honor, we feel the Government is entitled to a judgment in this case in the amount of $4,450, plus interest as provided by law. [34]

The Court: All right.

Mr. Yardum: If the court please, I would like to make several comments.

Firstly, counsel has just mentioned that there have been many circuits, or, it seems to me that he said many circuits, or that there have been no circuits that have sustained the taxpayer in a case like this.

My recollection is that there have been only one or two circuits that have passed on this, the Avalon case and the Geer case. The Peony Park case was in the Eighth Circuit, I believe, where the Birmingham v. Geer decision was laid down, and it would seem untenable to me that one circuit court in this country could decide what Congress meant and settle the question.

Now, on the point about the Act becoming effective on November 1, 1951, I think that that point is handled very well in the Geer v. Birmingham decision, and I would refer your Honor to that decision for that point, as well as all of the others. The judge in that case stated our case better than I could ever say it.

I believe that is all, your Honor.

The Court: The matter will stand submitted. I will go over the matter a little more carefully before deciding it.

Mr. Messer: I did not mean to mislead the court, that there were a number of circuits. [35]

The Court: There are two circuits.

Mr. Messer: In my brief I said there were only two courts of appeal that had passed on it.

The Court: Yes, two circuits decided it, one under the old law, and one under the new law.

Mr. Messer: Under the new law, yes.

The Court: Yes, I understand the matter.

The matter will stand submitted, and you will hear from the clerk in a few days.

Mr. Messer: Thank you, your Honor.

Mr. Yardum: Thank you, your Honor. [36]

[Endorsed]: Filed Aug. 20, 1957.

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith, and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to, during the periods involved in this action, as follows:

I.

The plaintiff in this action was the operator of an establishment known as "Riverside Rancho" which is located at 3213 Riverside Drive, Los Angeles, California.

II.

The physical layout of the Riverside Rancho was as follows:

1. The entire area within which was located the establishment herein involved was bounded on all sides by a wooden fence approximately 7 feet high.

2. There was an entrance into this area. Said entrance was on Riverside Drive and was approximately 6 feet wide. A public sidewalk was located along the side where this entrance was placed. Hereafter, said entrance will be referred to as the "main entrance."

3. Immediately outside the gate to the main entrance was located a box office.

4. Upon entering the premises, there was an uncovered patio area.

5. To the right of the main entrance and in the patio area there was a milk bar where refreshments were sold to anyone entering the fenced-in area.

6. Upon crossing the patio, and straight ahead from the main entrance, there was a building within which was a dance area of 6,000 to 7,000 square feet. This dance area was approximately 35 feet from the milk bar.

7. Within the same building as the dance area, there was a check room and a bar where liquor and beer were sold and served. This bar was equipped with about 30 stools and about 8 long benches which seated about 12 to 14 persons each.

8. The liquor bar and the dance area are separated by a solid wall except for an opening approximately 5 feet wide between the dance area and the liquor bar. This opening was never closed by order of the City of Los Angeles Fire Department.

9. Patrons were permitted to pass freely between the dance area and liquor bar through the above-

mentioned opening in the wall, except that no refreshments were allowed to be taken into the dance area.

10. Within the fenced area there was also located a separate building on the second floor of which there was an area of approximately 400 square feet referred to as the dining room. This building was separate and apart from the dance area. The building of the dance area was approximately 100 feet from the building within which was located the dining room. Food was served in said dining room during the hours set forth in paragraph VII below.

III.

Within the area enclosed by the wooden fence there was approximately one acre of ground. The physical layout of the establishment will more clearly appear from a sketch of the layout and from photographs thereof which are hereinafter referred to. Said sketch and photographs are made a part of this stipulation.

IV.

From April 1, 1948 to June 20, 1950, a general admission charge of $1.20 was charged to any person desiring to enter into the area enclosed by the wooden fence.

V.

After June 20, 1950, the general admission charge was $1.00, except on Friday and Saturday evenings when $1.20 was charged. On Wednesday and Sunday nights, ladies were admitted for $.20.

VI.

The Riverside Rancho was operated only during

the hours from 8:00 or 9:00 P.M. to 12:00 or 1:00 A.M. as the occasion warranted. On Wednesdays and Sundays the establishment opened at 8:00 P.M. and closed at midnight. On Saturdays the hours were from about 8:00 P.M. to 1:00 or 1:30 A.M.

VII.

The dining room was operated on a different time schedule from the balance of the establishment. It opened daily at 6:30 P.M. There was a separate entrance (as distinguished from the "main entrance" referred to above), which remained open until about 8:00 P.M. There was no admission charge for those persons entering the dining room through the dining room entrance, which entrance was closed at about 8:00 P.M. and anyone who wished thereafter to enter the dining room by this entrance first had to pay the same admission charge as those who entered the enclosed area by way of the main entrance.

VIII.

Except for the dining room customers who entered said dining room during the hours set forth above, no one could enter the enclosed area, including the patio, dance area, milk bar and hot dog stand, liquor bar, and dining room without first paying the admission charge.

IX.

There were no passout privileges. Anyone leaving the enclosed area and thereafter desiring to return were required to pay an additional admission charge.

X.

Once within the enclosed fenced area, patrons were permitted to move freely from one room or building to another or to any other part of the enclosed fenced area without additional charge of any kind, except that no refreshments of any kind were permitted to be taken into the dance area, and this was enforced by the posting of special private policemen at each of the entrances into the dance area.

XI.

No refreshments are sold or allowed (as stated above) in the dance area, nor was any service of any kind provided therein. There were benches along the walls of the dance area, but there were no tables or chairs in this area.

XII.

The Riverside Rancho employed a western dance orchestra to supply the music for dancing in the dance area. The orchestra took approximately 10 minutes intermissions at approximately one hour intervals. Except for said orchestra, no dinner dance music, floor shows or other entertainment was furnished within the fenced area, either indoors or outdoors.

XIII.

It was not possible for the customers in the dining room, while in the dining room, to see or hear the music being played by the orchestra since the building housing the orchestra and the building housing the dining room were separated by approx-

imately 100 feet as stated above. There was no dancing in the dining room, but a bar was located therein.

XIV.

The patrons in the liquor bar could not see the orchestra while said patrons remained in said liquor bar area. Although the music being played by the orchestra in the dance area did drift through the 5 foot opening in the partition between the dance area and the liquor bar area, the patrons in the liquor bar area were not able to hear intelligible strains of music being played by the orchestra. There was no dancing allowed in the liquor bar area. The statements in this paragraph apply to the milk bar also, i.e., music could be heard but it was unintelligible, and no dancing was allowed in the milk bar area.

XV.

The Riverside Rancho was licensed by the City of Los Angeles licensing department. On the licenses issued, the Riverside Rancho was designated as "dance hall."

The Los Angeles Police Department also had issued licenses to said Riverside Rancho and had designated said establishment thereon as public dance hall cafe.

The Board of Fire Commissioners of the City of Los Angeles had issued its Fire Permits to said Riverside Rancho and had designated said Riverside Rancho thereon as "Dancing" and "Cafe-Ballroom."

The dining room was separately licensed as a restaurant by the City of Los Angeles.

XVI.

The prices charged for drinks at the bar were as follows: Eastern beer, 40c; Western beer, 30c; average of other drinks, 60c. The following refreshments were sold at the milk bar with the following prices: hot dogs at 20c; coffee at 10c; soda pop at 10c.

XVII.

It is stipulated that the following exhibits may be offered on behalf of the plaintiff:

1. Exhibit A—Claim for refund dated January 26, 1954.

2. Exhibit B—Sketch of layout of the Riverside Rancho premises.

3. Exhibit C—Photographs marked on reverse side as follows:

1800-149; 776-2189; 776-2190; 776-2192; 1771-30; 1800-148; 776-2195; 776-2194; 776-2193; 776-2191.

It is stipulated that the following exhibits may be offered on behalf of the defendant:

1. Exhibit 1—Schedule of receipts from admissions and refreshments and food sales by plaintiff during the periods involved.

2. Exhibit 2—Forms 899, Certificate of Assessments and Payments, for the periods involved.

Dated: December 13, 1956.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant United States
Attorney,
Chief, Tax Division,
JOHN G. MESSER,
Assistant United States
Attorney,
/s/ JOHN G. MESSER,
Attorneys for Defendant.
ENGER & YARDUM,
/s/ By LE VONE A. YARDUM,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.
[Endorsed]: Filed Dec. 14, 1956.

PLAINTIFF'S EXHIBIT No. 4

U. S. Treasury Department
Internal Revenue Service
District Director
Los Angeles 12, Calif.

March 27, 1956

In Reply Refer to: Code 1230-796

Marty W. Landau
DBA Riverside Rancho
3213 Riverside Drive
Los Angeles 27, California

Claim for Refund of $19,590.93, Taxable Period: 12/1/49 to 11/30/51.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

District Director.

Registered Mail 154742

ry

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: 95; Received Jan. 26, 1954; Director Int. Rev., Los Angeles.

* * * * *

√ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

Notice—Under Reorganization Plan No. 1 of 1952, Reference to Collector Now Relates to Director of Internal Revenue.

Name of taxpayer or purchaser of stamps: Marty W. Landau DBA Riverside Rancho.

Street address: 3213 Riverside Drive.

City, postal zone number, and state: Los Angeles 27, California.

1. District in which return (if any) was filed: Los Angeles, California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Dec. 1949, to November, 1951.

3. Kind of tax: Cabaret.

4. Amount of Assessment, $19,590.93; dates of payment, Various.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded: $19,590/93.

7. Amount to be abated (not applicable to income, estate, or gift taxes) .....

The claimant believes that this claim should be allowed for the following reasons:

We hereby apply for refund of cabaret taxes in the amount of $19,590.93, plus interest thereon, inasmuch as we were not liable for the payment of this cabaret tax, and said tax was erroneously paid over to the Government.

Attached hereto is a record of taxes paid, interest to be added.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: January 26, 1954.

/s/ MARTY W. LANDAU.

[Letterhead of Riverside Rancho]

Period for which tax was paid, and amount of tax paid.

December, 1949	$ 1,067.58
January, 1950	1,020.08
February, 1950	1,315.29
March, 1950	1,251.84*
April, 1950	1,292.89*
May, 1950	950.49*
June, 1950	966.81*
July, 1950	935.09*
December, 1950	952.62
January, 1951	1,045.57
February, 1951	1,112.23
March, 1951	1,075.21
June, 1951	1,586.99
July, 1951	1,321.25
August, 1951	1,322.95
September, 1951	1,096.89
October, 1951	1,277.15
Total	$19,590.93

*These five items have a penciled notation "No."

Received: 95; Jan. 26, 1954; Director of Int. Rev., Los Angeles.

POWER OF ATTORNEY

I/we, the undersigned, Marty W. Landau DBA Riverside Rancho, of 3213 Riverside Drive, Los Angeles 27, California. Hereby make, constitute and

appoint Charles P. Carter and/or Oliver R. Mills of 8533 Sunset Blvd., Hollywood 46, California, enrolled to practice before the Treasury Department on Carter—5-14-52, Mills—2-13-52, my/our true and lawful representative(s), for me/us and in my/our name, place and stead, to act for me/us, and to appear for, and represent me/us, before the Treasury Department of the United States Government, or agent or employee thereof, in any matter involving my/our federal taxes, for any and all years, giving and granting to said representative(s) full power and authority to do and perform any and every act and thing relative to my/our tax liability, as fully and to all intents and purposes as I/we might do if personally present, including but not limited to the power:

(1) to receive but not to endorse and collect checks in settlement of any refund;

(2) to delegate authority, associate or to substitute another agent(s);

(3) to execute consents agreeing to a later determination and assessment of taxes than is provided by the Statute of Limitations;

(4) to execute closing agreements relative to tax liability; and,

(5) it is further directed that copies of all correspondence, reports, documents, etc., in connection with the above matters be sent to said representative(s).

All powers of attorney involving federal taxes,

heretofore filed or executed by the undersigned, are hereby revoked, and all prior representatives have been notified of such revocation(s).

Dated this 16th day of April, 1955.

/s/ MARTY W. LANDAU.

County of Los Angeles,
State of California—ss.

Subscribed and sworn to before me this 16th day of April, 1955.

[Seal] /s/ R. M. SANDERS.

Received: Apr. 20, 1955; Appellate Division, Los Angeles Office.

STATEMENT RELATIVE TO FEES TO BE FILED WITH POWER OF ATTORNEY

Los Angeles, California,
April 20, 1955.

This is to certify that I have not entered into a contingent or partially contingent fee agreement for the representation before the Department of Marty W. Landau in the matter of Federal Taxes under the terms of a power of attorney filed with the Treasury Department on April 20, 1955 and (in case a contingent or partially contingent fee agreement has been made) that a report of such fee agreement (has) (has not) been made to the Committee on Practice.

/s/ OLIVER R. MILLS.

Received: Apr. 20, 1955.

DEFENDANT'S EXHIBIT C

U. S. Treasury Department
Internal Revenue Service
District Director
Los Angeles 12, Calif.

March 27, 1956

In Reply Refer to: Code 1230-796

Marty W. Landau
DBA Riverside Rancho
3213 Riverside Drive
Los Angeles 27, California

Claim for Abatement $4,450.00
Claim for Refund of $880.49
Taxable Period: 10/50 to 9/53

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

District Director.

Registered Mail 154741

ry

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp; Received: 95; Sep. 23, 1955; Director Int. Rev., Los Angeles; Teller #9.

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

XX Refund of Taxes Illegally, Erroneously, or Excessively Collected.
Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

XX Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Marty W. Landau DBA Riverside Rancho.

Street address: 3213 Riverside Drive.

City, postal zone number, and State: Los Angeles 27, California.

1. District in which return (if any) was filed: 6th California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Oct., 1950, to Oct. 1953.

3. Kind of tax: Cabaret (Additional).

4. Amount of assessment, $5330.49; dates of payment: $880.49 paid during Jan. thru Aug. 1955.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded: $880.49.

7. Amount to be abated (not applicable to income, estate, or gift taxes): $4450.00.

The claimant believes that this claim should be allowed for the following reasons:

Assessment was erroneously made. Amount paid on account should be refunded to taxpayer and balance of assessment abated. Taxpayer liable for Admissions Tax only, which has been paid. Taxpayer filed claim for refund of $19,590.93 (form #843) on or about February 2, 1954, which is now in the Appellate Division for consideration. Said claim is assigned to F. N. Gilbert, who has been furnished with statement of facts, and this claim is based on same issue. Taxpayer contends that at no time was he liable for Cabaret Tax under section 1700 (e) of the Code, although for a limited period of time he did pay it, upon the advice of his accountant and others. Cabaret tax which he paid, was not collected from customers, but absorbed by taxpayer.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: Sept. 9, 1955.

/s/ MARTY W. LANDAU,
DBA Riverside Rancho.

[Endorsed]: No. 15696. United States Court of Appeals for the Ninth Circuit. Marty W. Landau, doing business as Riverside Rancho, Appellant, vs. Robert A. Riddell, individually and as District Director of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 4, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15696

MARTY W. LANDAU, doing business as Riverside Rancho, Appellant,

vs.

ROBERT A. RIDDELL, individually and as District Director of Internal Revenue for the Sixth District of the State of California, Appellee.

STATEMENT OF POINTS RELIED ON

To the Honorable United States Court of Appeals for the Ninth Circuit:

The appellant above named hereby indicates and

states the points upon which he intends to rely in the foregoing and above entitled appeal to be as follows:

(1) That the taxpayer was not the proprietor or the owner of an establishment coming within the term "roof garden, cabaret, or similar place" as such term is used in Section 1700(e) of the Internal Revenue Code (1939) as amended.

(2) That under the regulations of the Commission of Internal Revenue issued pursuant to the Revenue Act of 1941, which amended Section 1700 (e), the Commissioner interpreted said section as excluding dance halls, and ballrooms similar to that conducted by the Appellant from the provisions of said section.

(3) That Congress, speaking through the members of the House Ways and Means Committee and the Senate Finance Committee, on the Revenue Act of 1951, declared that it was its intent and purpose in the passage of Section 1700 (e) of the Revenue Code of 1939, as amended in 1941, that dance halls and ballrooms similar to that conducted by the taxpayer were not included within the meaning of the term "roof garden, cabaret, or similar place".

(4) That the Commissioner has not published in his Internal Revenue Bulletins or his Cumulative Bulletins any change in the regulations promulgated by him under the provisions of the Internal Revenue Act of 1941, setting forth his interpretation of Section 1700 (e) of the Internal Revenue

Code of 1939, as amended by the Revenue Act of 1941.

(5) That the action of the Congress in relation to said Section 1700 (e) was not a change or amendment of the law as set forth in said section, but was merely a declaration and clarification of the existing law.

Dated: October 3, 1957.

/s/ CLINTON F. SECCOMBE.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 8, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

SUPPLEMENT TO STATEMENT OF POINTS RELIED ON

To the Honorable United States Court of Appeals for the Ninth Circuit:

The Appellant above named, having heretofore indicated the points upon which he intends to rely in the foregoing and above entitled Appeal, hereby supplements said Statement of Points Relied On, by adding thereto an additional Point (6), as follows:

(6) That the cabaret tax was not imposed as a direct tax on the proprietor or owner of a cabaret, roof garden, or similar place. Under the provisions of the Internal Revenue Code he was charged with

the duty of returning all payments of such taxes received by him. When the Commissioner of Internal Revenue, or his delegate, by issuing a letter in January, 1951, informing all Collectors of Internal Revenue of the change in his interpretation of Section 1700 (e), Internal Revenue Code (1939), as amended, declared that such ruling should be applied retroactively, he penalized all owners and proprietors of dance halls, and ballrooms, similar to that operated by the taxpayer, (appellant), who had failed to collect a cabaret tax from their patrons, because of their reliance upon the Commissioner's long standing interpretation of the intent and purpose of Congress, under which he had declared that no cabaret tax was due from them.

Dated October 10, 1957.

/s/CLINTON F. SECCOMBE.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 11, 1957. Paul P. O'Brien, Clerk.